Supreme Court, U. S.
FILED
OCT 12 1978
MICHAEL RODAK, JR., CLERK

78-1028

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

M. DANIEL FRIEDLAND,

Petitioner,

against

THE INDIANA BELL TELEPHONE COMPANY, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE UNITED STATES

---

pro se

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Petitioner, M. Daniel Friedland, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Indiana Court of Appeals for the Second District entered in this proceeding on March 9, 1978.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Apendix A.

JURISDICTION

The judgment of the Indiana Court of Appeals for the Second District was entered on March 9, 1978. A timely petition for rehearing was denied April 17, 1978. A subsequent Petition for Transfer was filed with the Indiana Supreme Court and denied July 14, 1978, and this Petition for Certiorari was filed within 90 days of the latter date. This Court's jurisdiction is invoked under 28 U.S.C. 1287(3).

QUESTIONS PRESENTED

1. Whether the Indiana Court of Appeals erred in dismissing petitioner's lawsuit on jurisdictional grounds, wher IC 8-1-2-103, IC 8-1-2-105 and IC 8-1-107 guarantee consumer redress for the arbitrary and discriminatory application of a utility rate.
2. Whether the Indiana Court of Appeal erred in relegating to The Indiana Public Service Commission sole authority to adjudicate questions of arbitrary and discriminatory applications of rates against a consumer in derogation of Indiana Statutory Law I.C. 9-1-2-103, 105, 107, which provides the consummer a private right of action against a utility in Court.

STATEMENT OF THE CASE

This case was initiated on the authority of a complaint filed on June 14, 1974, for damages and injunctive relief brought pursuant to I.C.8-1-107 which provides for money damages for arbitrary and discriminatory utility rates.

> 8-1-2-107 [54-706] Damages for unlawful acts. If any public utility shall do, or cause to be done or permit to be done, any matter and, or thing in this act [8-1-2-1, 8-1-2-120] prohibited or declared to be unlawful, or shall omit to do any act, matter or thing required to be done by this act, such public utility shall be liable to the person, firm, or corporation injured thereby in the amount of damages sustained in consequence of such violations: Provided, That any recovery as in this section provided shall in no manner affect a recovery by the state of the penalty prescribed for such violation. [Acts 1913, ch. 76, §110, 167].

This statute grants the private right of civil action to any person who has been injured by an act or omission of any public utility, which act or omission is prohibited or declared to be unlawful by the Public Service Commission Act of 1913, IC 1971, §8-1-2-1 et seq. Specifically petitioner seeks damages because of discrimination by the Telephone Company under IC, 1971, §8-1-2-103, and because of the granting of unreasonable preferences by the Telephone Company under IC, 1971, §8-1-2-105. In addition, Petitioner seeks declaratory relief because of the arbitrary, capricious, discriminatory and preferential application of the Joint User Tariff by the Telephone Company to himself.

After the Telephone Company filed a general denial, a hearing was set up for class certification of those consumers who were being assessed the joint user tariff. The Trial Court certified the Class Action with

the following Order:

> "Parties in person and by counsel, evidence heard under oath, Court finds that pursuant to T. R. 23 (A), 23(B)(3) class is hereby certified as those persons and/or businesses as of June 5, 1974, classified as joint users as set out in plaintiff's Exhibit "1" introduced herein, and plaintiff is hereby ordered to prepare form of notice of these proceedings for approval of the Court pursuant to 23(C)(2) within ten (10) days." (Tr. p. 264)

On June 2, 1976, the trial court approved an interlocutory appeal on the class action issue to the Court of Appeals. On March 9, 1978, the Court of Appeals reversed the class action and dismissed the complaint for lack of subject matter jurisdiction. On April 17, 1978, the petition for rehearing was denied. On July 14, 1978, the petition for transfer to The Indiana Supreme Court was denied necessitating this appeal to the United States Supreme Court.

REASONS FOR GRANTING THE WRIT

The extraordinary dismissal of petitoner's case on jurisdictional grounds leaves the Indiana consumer totally without redress for damages caused by the arbitrary and discriminatory application of a rate by a utility in violation of their own tariff structure. At best, according to The Indiana Court of Appeals' decision, the Indiana utility consumer may band with nine others and seek prospective redress from the Public Service Commission. The Indiana Court of Appeals' decision effectively emasculates the Indiana

consumers' most potent remedy, that of money damages, for unfair utility practices. In order to reach this contrived result, the Court of Appeals, in effect, overruled a specific Indiana Statute that guaranteed the consumer a private right of action for money damages.

In State ex rel. Indianapolis Water Co. v. Niblack (1959) 240 Ind 32, 161 N.E.2d 377, the Court held that the Public Service Commission is an administrative agency and has no judicial power to render a money judgment.

The Court of Appeals, on page 8, states,

> "An analysis of the pertinent statutes and case law leads us to the conclusion that the legislative intent was to grant the Public Service Commission jurisdiction over such claims. It is established that the Commission is empowered to investigate "services" as defined in the"broadest and most inclusive sense", and to determine whether, and provide relief if, such "services" and "in any respect unreasonable*****or unjustly discriminatory."

thereby missing the entire point of the petitioner's damage suit. Petitioner is not seeking merely to review a rate structure. Petitioner is seeking money damages for the arbitrary and improper application of the rate against him. He was singled out among the panoply of lawyers who are operating as associates for the distinct privilege of being a joint user. Furthermore, there is no functional distinction between legal partnerships and legal associations to justify the imposition of the added joint user tariff.

The Indiana Court of Appeals has put petitioner in a Catch 22 situation. Now there is no way a consumer can redress an unlawful application of a tariff. According to the approved joint user tariff, it is the consumer, not the Telephone Company, that activates the assessment of the joint user service. Joint User Service is a shared service arrangement which allows the business telephone exchange service of a customer to be used, "when designated by the customer, by individuals, firms or corporations not otherwise permitted use of the customer's business service by this tariff."

"Application for Joint User Service, and for changes in service or equipment therewith, must be executed by the customer. The customer is responsible for payment of all charges incurred, regardless of whether such charges are associated with his usage, or that of any of his Joint Users."*

Here, the Telephone Company arbitrarily and discriminatorily decided to apply a joint user service involuntarily against the petitioner. If the Telephone Company had only followed the approved tariff in a lawful manner, there would have been no need to resort to litigation. The Public Service Commission has no power to assess money damages. The Court of Appeals' decision gave the utility carte blanche to ignore their own tariffs with impunity and

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*Joint User Service Tariff, P.S.C.I. No.T-6, Part III Section 17 Second Revised Sheet 1. Indiana Bell Telephone Company, In.c General Service Exchange.

remain unaccountable for money damages. Likewise, the aggrieved consumer has no way of recovering money damages for unlawful acts of utilities. In an age of concern over inflated costs, this aberrant Indiana decision poses ominous consequences to the consumer movement in the area of utility reform. Furthermore, the issue is of national importance because in Maryland in the case of Stillman and Dolan, Inc. v. Chesapeake and Potomac Telephone Co. of Maryland (1976) 30 Md.App.179, 351 A.2d 172, similarly blocked effective legal action by the consumer.

The Indiana regulatory scheme is even more onerous since, in Maryland, one person can invoke the jurisdiction of the State Public Service Commission, while in Indiana, the statute requires ten complainants. Therefore, practically speaking, the difficulty of organizing ten consumers offers the individual aggrieved consumer no effective recourse.

In Winfield v. Public Service Commission, 1911, 187 Ind. 53, 118 N.E.532, the Court held:

> "This obligation to serve is without discrimination, not only as to service, but also as to person, and prices charged. It necessarily follows that price or rate changes, without notice and from hour to hour, or minute to minute, cannot be made, and thus circumvent the principle of law involved. The duty to serve could be nullified if there were not the attendant duty also to serve at a reasonable charge. If a business "affected with a public interest" could make exorbitant charges for

> its services, it could thereby serve only whom it saw fit, and when it saw fit, by manipulating its charges and prices."

In the case of Foltz vs. City of Indianapolis (1955) 234 Ind. 565, 130 N.E.2d 650, 656-657, the Court held

> "(9) A consumer may sue to recover damages at common law resulting from discrimination by a utility as to services or rates. There are private rights which belong to the individuals constituting the public to whom "holding out" of the business is made. St. Clair Borough v. Tamaqua & Pottsville Electric R. Co., 1918, 259 Pa. 462, 103 A.287, 5 A.L.R. 20; Lewis v. Mayor and City Council of Cumberland, 1946, 189 Mr. 58, 54 A.2d 319; Columbia Baking Co., v. Atlanta Gas Light Co., 1948, 78 Ga.App. 241, 50 S.E.2d 382; 43 Am.Jur., Public Utilities and Services, §§ 30, 33, 67, pp. 592, 594, 615; 73 C.J.S., Public Utilities, §30, p. 1051.***
>
> "(10) Historically, the duty owed to the individuals composing the public, existed before the state assumed the prerogative or rate regulation. The common law right of the individual to compel service without discrimination or extortion exists regardless of any statute, charter or franchise, providing for such service of the public on reasonable terms. 43 Am. Jr., Public Utilities and Services, §22, pp. 586,587; 75 Univ.Penn L. Rev. 411."

The language clearly indicates that there existed at common law a private right to recover damages resulting from discrimination by utility as to rates regardless of any statute, charter, or franchise providing for such service to the public on reasonable terms.

The right to pursue an action for the recovery of an excessive or improper rate was also recognized in the case of Indiana & Michigan Electric Co. vs. Southern Wells School Building Corporation (1972) - Ind.-, 279 N.E.2d 228, 229. There the Court, citing an earlier opinion, stated that the Court felt it was the clear duty of the so-called aggrieved party to pay the rate demanded of him and then seek an adjustment of the matter by the ordinary process of law.

The right of customers against the utility is recognized and preserved under the Statutes of this State. IC 8-1-2-105 provides in pertinent part as follows:

> "If any public utility makes or gives any undue or unreasonable preference or advantage to any particular person, firm or corporation, or shall subject any particular person, firm or corporation to any undue or unreasonable prejudice or disadvantage in respect whatsoever, such public utility shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared unlawful."

In order to protect the rights guaranteed to customers of public utilities under the provisions of IC 8-1-2-105 and under other provisions of the Public Service Commission

Act of 1913, the legislature enacted IC 8-1-2-107 which provides for a private right of action. It is apparent by the proviso in IC 8-1-2-107, supra, that the legislature contemplated a civil action based upon the provisions of IC 8-1-2-105 which provided a misdemeanor penalty in addition to any civil liability imposed by the language quoted above. The criminal penalty provided for in IC 8-1-2-105 for the misdemeanor offense was a fine of not less that $50.00 nor more than $1,000.00 for eac offense.

The Supreme Court of Indiana has also recognized IC 8-1-2-107 as giving a right of action. Trustees of Depauw Memorial Methodist Episcopal Church v. New Albany Water Works (1923), 193 Ind. 368, 140 N.E. 540, 541-542.

The Indiana Supreme Court has also recognized the statutory prohibition against cahrging discriminatory rates in the case of Indiana & Michigan Electric Co. v. Southern Wells School Building Corporation, supra, 279 N.E.2d 229 where it stated the court recognized the existence of an independent action at law to seek an adjustment of a dispute over the charging of discriminatory rates by the ordinary process of law to recover indebtedness that might arise out of the conduct of the utility.

The fact situation here comes clearly within the holding of the Supreme Court of the United States in the case of Nader v. Allegheny Airlines, Inc. (1976) 96 S.Ct.1978, 1986-88.

Under the decision of the Nader case, the court held that an action seeking damages for failure to disclose overbooking practices could be maintained as a tort action

with primary jurisdiction resting in the trial court since the standards to be applied in an action for fraudulent misrepresentation were within the conventional competency of the courts and the judgment of a technically expert body is not likely to be helpful in the application of the standards to the facts of the case. In that case, the court took recognizance of a C.A.B. regulation which permitted the aggrieved passenger an alternative to pursue his remedy under the common law.

It is clear that the General Assembly in enacting IC 8-1-2-107 intended to preserve the remedy of an action at law for a wrongful charge, and the Supreme Court of Indiana has determined that primary jurisdiction in such cases lies with the trial courts (Indianapolis Water Company v. Boone Circuit Court (1974) ____ Ind. ____ 307 N.E. 2d 870, 872). The Court of Appeals decision created a loophole from which issues a dangerous precedent to put a utility above the law and for that reason alone the Supreme Court should grant certiorari.

CONCLUSION

For the foregoing reasons, it is repectfully prayed that a writ of certiorari be granted to review the decision of the Indiana Supreme Court.

Respectfully submitted,

/s/ Dan Friedland

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APPENDIX

IN THE

COURT OF APPEALS OF INDIANA

SECOND DISTRICT

INDIANA BELL TELEPHONE COMPANY, INC.,

Appellant (Defendant Below),

v.

M. DANIEL FRIEDLAND,

Appellee (Plaintiff Below).

CAUSE NO. 2-676 A 242

HONORABLE PATRICK D. SULLIVAN, PRESIDING JUDGE

Indiana Bell Telephone Company, Inc., (Bell) appeals from an interlocutory order which certified a calss under Ind. Rules of Procedure, Trial Rule 23. We obtained jurisdiction pursuant to Indiana Rules of Procedure, Appellate Rule 4(B)(5).

Friedland, a practicing attorney in Indianapolis, filed a complaint on behalf of himself and others similarly situated. He challenges the validity of certain telephone rates and practices of Bell categorized under the heading of "joint user service."

Bell had on file with the Public Service Commission an approved tariff schedule[1/]

1/ Rates of a public utility must be reasonable and just, I.C.8-1-2-4 (Burns Code Ed. 1973), and every public utility is re-

pursuant to which Friedland was assessed a rate which included an additional charge of $15.65 per month. Bell assessed this additional charge because Friedland shared his telephone service with another attorney for business purposes. The tariff provides that any customer who shares his telephone with persons, firms or corporations other than the customer's family, employees, representatives or persons residing in his household shall be charged a "joint user" rate.

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quired to file with the Public Service Commission a schedule of rates. I.C. 8-1-2-38 (Burns Code Ed. 1973).

The tariff schedule here involved reads, in pertinent parts:

"JOINT USER SERVICE"

"GENERAL

"Joint User Service is shared service arrangement which allows the business telephone exchange service of a customer to be used, when designated by the customer, by individuals, firms or corporations not otherwise permitted use of the customer's business service by this tariff."

***

"USE OF SERVICE

"Customer's telephone service, equipment and facilities, as distinguished from public and semi-public telephone service, are furnished only for communications by the customer, his family, employees or representatives, or persons residing in the customer's household, except as the use of the service may be extended to joint users, and may not be resold***"

It appears that Friedland and his colleague, Ronald Bussell, shared space, expenses and use of the telephone service in one law office. However, they were not partners nor did they practice as a professional corporation nor was either the employee of the other. At the certification hearing, Friedland introduced evidence suggesting that different rates had been assessed to various customers, all of whom allegedly received substantially the same service.

With difficulty, we have been able to glean from Friedland's complaint and brief the following allegations:

(1) that his fellow attorney was his "representative" and therefore the "joint user" rate should not have been assessed to him;

(2) that the discrimination inherent on the face of the approved tariff, between lawyers within a firm and lawyers sharing some other arrangement, is arbitrary and unreasonable; and

(3) that, assuming the facial validity of the tariff, it has nevertheless been applied by Bell in an arbitrary and discriminatory manner.

Friedland brought his action as a class suit on behalf of all Bell customers similarly situated. He seeks damages for any wrongful charges as well as declaratory and injunctive relief. The trial court, after hearing evidence, certified a class as per the following order:

"Parties in person and by counsel, evidence heard under oath, Court

finds that pursuant to T.R. 23(A), 23(B)(3) class is hereby certified as those persons and/or businesses as of June 5, 1974 classified as joint users as set out in plaintiff's Exhibit '1' introduced herein, and plaintiff is hereby ordered to prepare form of notice of these proceedings for approval of the Court pursuant to 23 (C)(2) within ten (10) days."

Plaintiff's Exhibit "1", referred to in the order, is a list supplied to Friedland by Bell of all customers in the Indianapolis area who were bing charged the "joint user" rate as of June 5, 1974. The class as thus fixed was composed of 142 separate persons or entities.

Our disposition of this appeal requires the resolution of two issues:

(1) Is subject-matter jurisdiction of the trial court a proper issue for determination upon review of an interlocutory order certifying the existence of a class?

(2) If so, did the trial court have subject-matter jurisdiction?

I.

Bell contends that the trial court is without jurisdiction because Friedland is attacking the rates, services and practices of a public utility, matters which Bell argues are exclusively within the purvies of the Public Service Commission.

Although we are reviewing the propriety of an interlocutory order certifying a class, we properly consider the trial court's jurisdiction over the subject matter for the following reasons. First, it is well-established that "[w[hen there is a lack of jurisdiction of the subject matter in the trial court, the question may be raised at any time and in any manner before final decision and, if not raised in the trial court or by a party to the appeal, then it is the duty of the appeal court sua sponte to raise and determine it." Bobbitt, Indiana Appellate Practice and Procedure, ch. 5, p. 77 (1972). The court in Decatur County REMC v. Public Service Co. (1971) 150 Ind.App.193, 197, 275 N.E.2d 857, 860, stated in reviewing the grant of a permanent injunction:

"Under the new Rules of Civil Procedure adopted January 1, 1970, the question of jurisdiction over the subject matter is usually raised either in a consolidated motion before answer or by the answer itself if no such motion is used. See Rule TR.12. However, this defense is available at any time before final decision and in any manner, and if not raised by a party it is our duty, sua sponte, to raise and determine it. Bohannan v. Bohannan (1961) 132 Ind. App. 504, 167 N.E.2d 717; State ex rel. Ayer v. Ewing, Judge, (1952) 231 Ind. 1, 106 N.E.2d 441; Harvey's Indiana Practice, Vol. 1, pp. 604-608. Unlike jurisdiction over the particular case, subject-matter jurisdiction cannot be imposed by mutual consent or waived. Indiana Real Estate Commission v. Blue (1963) 135 Ind.App.121, 190 N. E.2d 32; State ex rel.Standard Oil Co. v. Review Board of Indiana Employment Sec. Div., (1951) 230 Ind.1, 101 N. E. 2d 60."

Furthermore, Ind. Rules of Procedure, Trial Rule 23, which sets forth the requirements for a class action, specifies that where, as alleged here, there are common questions of fact or law, the class action must be "superior to other available methods for the fair and efficient adjudication of the controversy." T.R.23(B)(3). Obviously, if the trial court is without subject-matter jurisdiction, this class action would not be the "superior" method of adjudication. Thus, recognition of subject matter jurisdiction is inherent in the review of a class certification under T. R. 23. In this connection, it would seem an exercise in futility to affirm an interlocutory order certifying a class, thereby encouraging lengthy further proceedings, if we were of the view that the trial court lacks subject matter jurisdiction of the action brought by the class.

We therefore proceed to consider Bell's contention that the trial court lacks jurisdiction over the claims presented by Friedland.

II

Under Indiana law the establishment of rates for public utilities is a legislative function. Public Service Commission v. Indiana Bell Tel. Co. (1953) 232 Ind. 332, 112 N.E.2d 751. The Public Service Commission is a creature of the legislature, see Town of Merrillville v. Lincoln Utilities, Inc. (1st Dist. 1976) Ind.App. 355 N.E.2d 851, and it possesses only that jurisdiction or authority granted to it by statute. General Tel. Co. of Ind. v. Public Service Commission of Ind. (1958) 238 Ind. 646, 154 N.W. 2d 372; Indiana Tel. Corp. v. Indiana Bell Telephone Co. Inc. (2d Dist. 1976) Ind.App.,

358 N.E.2d 218; Citizen's Gas and Coke Utility v. Sloan (1964) 136 Ind. App. 297, 196 N.E.2d 290.

It is also axiomatic that where an administrative remedy is provided by statute, one who seeks relief must first exhaust the administrative alternatives before applying for judicial review. State ex rel. Paynter v. Marion County Superior Court, Rm. No. 5 (1976) Ind., 344 N.E.2d 846; City of East Chicago v. Sinclair Refining Co. (1953) 232 Ind. 295, 111 N.E.2d 459.

Bell contends that Friedland is collaterally attacking, through the judicial process, acts of a public utility intended by the legislature to be reviewed and regulated by the Public Service Commission. Our consideration of this contention requires us to first determine whether in fact the pertinent statutes grant jurisdiction over such claims to the Public Service Commission and, if so, whether the Commission can be divested of jurisdiction when damages are sought.

Friedland alleges alternatively that (1) the tariff incorporating the "joint user" concept is unreasonable, (2) he should be considered a "representative" of his colleague and therefore excluded form the "joint user" rate; and (3) the tariff and rates have been applied in an arbitrary and discriminatory manner.

Initially, we note that Friedland's first allegation attacks the validity and reasonableness of the tariff itself, and therefore is properly within the exclusive jurisdiction of the Public Service Commission. The question of proper establishment of utility rates is a matter to be determined by the Public Service Commission and only

thereafter may such determination be reviewed by the courts. State ex rel.Indianapolis Water Co. v. Boone Circuit Court (1974) 261 Ind. 583, 307 N.E.2d 870; Public Service Commission v. City of Indianapolis (1956) 235 Ind. 70, 131 N.E.2d 308.

Friedland's second and third allegations, while still tangentially concerned with definitional concepts, nevertheless challenge the "services" and "practices" of Bell in applying the rate, as opposed to the validity of the rate itself. It is argued that discrimination in application of rates approved by the Public Service Commission presents one of those instances in which the judicial nature of the claim overshadows any administrative characteristic.[2]

2/ Courts have been hald to properly retain jurisdiction over claims of an administrative nature where there is alleged fraud, Citizen's Gas and Coke Utility v. Sloan (1964), supra, 196 N.E.2d 290, arbitrary and capricious action by an administrative body, Public Service Commission v. Indiana Bell Tel. Co., supra, 112 N.E. 2d 751, breach of a contract involving telephone service, Indiana Telephone Corp. v. Indiana Bell Tel.Co., Inc., supra, 358 N.E.2d 218, or conspiracy to prevent competition. WareHouse Distributing Corp. et al, v. Dixon (1933) 97 Ind.App. 475, 187 N.E. 217.

Friedland brings this action under I. C. 8-1-2-107 (Burns Code Ed. 1973)[3], which creates the right of a civil action for damages sustained in consequence of "unlawful acts" of a public utility. "Unlawful acts" are more specifically defined in part by the following statutes:

I.C. 8-1-2-103 (Burns Code Ed. 1973) provides, in pertinent part:

> "Discrimination in sales or service --Penalty--Special service. --If any public utility, or any agent or officer thereof, or any officer of any municipality constituting a public utility, as defined in this act [8-1-2-1--8-1-2-120], shall, directly or indirectly, by any device whatsoever, charge, demand, collect or receive from any person, firm or corporation a greater or less compensation for any service rendered or to be rendered, or for any service in connection therewith, than that prescribed in the published schedules or tariffs then in force or established as provided herein, or than it charges, demands, collects or receives from any other person, firm or corporation for a like and contemporaneous service, such public utility shall be deemed guity of unjust discrimination, which is hereby prohibited and declared to be unlawful, and,

3/ "Damages for unlawful acts. - If any public utility shall do, or cause to be done or permit to be done, any matter, act or thing in this act [8-1-2-1--8-1-2-120] prohibited or declared to be unlawful, or shall omit to do any act, matter or thing required to be done by this act, such public utility shall be liable to the person, firm or

upon conviction thereof, shall forfeit and pay into the state treasury not less than one hundred dollars [$100] nor more than one thousand dollars [$1,000] for each offense; and such agent or officer so offending shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not less than one hundred dollars [$100] nor more than one thousand dollars [$1,000[, for each offense, or imprisonment for not less than one [1] year: . . . ."

and I.C. 8-1-2-105 (Burns Code Ed. 1973) provides:

"Unreasonable preference--Penalty.--If any public utility makes or gives any undue or unreasonable preference or advantage to any particular person, firm or corporation, or shall subject any particular person, firm, or corporation to any undue or unreasonable prejudice or disadvantage in any respect whatsoever, such public utility shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared unlawful. Any person, firm or corporation violating the pro-provisions of this section shall

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corporation injured thereby in the amount of damages sustained in consequence of such violation: Provided, That any recovery as in this section provided shall in no manner affect a recovery by the state of the penalty prescribed for such violation."

be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not less than fifty dollars [$50.00] nor more than one thousand dollars [$1,000] for each offense."

Friedland not only admits but asserts that the questioned conduct of Bell falls within the definition of "service" as contemplated by the above statutes. Our inquiry is therefore narrowed to the question whether the Public Service Commission has jurisdiction to review and resolve claims arising under I.C. 8-1-2-103 and I.C. 8-1-2-105 and, if so, whether its jurisdiction may be divested when a prayer for damages is a part of the claim.

An analysis of the pertinent statutes and case law leads us to the conclusion that the legislative intent was to grant the Public Service Commission jurisdiction over such claims. It is established that the Commission is empowered to investigate "services" as defined in the "broadest and most inclusive sense", and to determine whether, and provide relief if, such "services" are "in any respect unreasonable*** or unjustly discriminatory." Decature County REMC v. Public Service Commission, supra, 275 N.E.2d at 861.

The obligation of the Public Service Commission to entertain and investigate complaints concerning discriminatory and unreasonable practices of a public utility is set forth by I.C. 8-1-2-54 (Burns Code Ed. 1973), which reads:

"Complaints - Investigation and hearing. - Upon a complaint made against any public utility by any mercantile, agricultural or manufacturing society or by any body politic or municipal

organization or by ten [10] persons, firms, corporations or associations, or ten [10] complainants of all or any of the aforementioned classes, or by any public utility, that any of the rates, tolls, charges or schedules or any joint rate or rates in which such petitioner is directly interested are in any respect unreasonable or unjustly discriminatory, or that any regulation, measurement, practice or act whatsoever affecting or relating to the services of any public utility, or any service in connection therewith, is in any respect unreasonable, unsafe, insufficient or unjustly discriminatory, or that any service is inadequate or cannot be obtained, the commission shall proceed, with or without notice, to make such investigation as it may deem necessary or convenient. But no order affecting said rates, tolls, charges, schedules, regulations, measurements, practice or act, complained of, shall be entered by the commission without a formal public hearing."

The power of the Public Service Commission to remedy such practices is embodied in I.C. 8-1-2-69 (Burns Code Ed. 1973):

"Inadequate service--Orders.--Whenever investigation made under the provisions of this act [8-1-2-1--8-1-2-120], the commission shall find any regulations, measurements, practices, acts or service to be unjust, nreasonable, unwholesome, unsanitary, unsafe, insufficient, preferential,

unjustly discriminatory or otherwise in violation of any of the provisions of this act; or shall find that any service is in adequate or that any service which can be reasonably demanded cannot be obtained, the commission shall determine and declare and by order fix just and reasonable measurements, regulations, acts, practices or services to be furnished, imposed, observed and followed in the future in lieu of those found to be unjust, unreasonable, unwholesome, unsanitary, unsafe, insufficient, preferential, unjustly discriminatory, inadequate, or otherwise in violation of this act, as the case may be, and shall make such other order respecting such measurement, regulation, act, practice or service as shall be just and reasonable."

Finally, I.C. 8-1-2-115 (Burns Code Ed. 1973) established the duty of the Public Service Commission to enforce the above provisions:

"Enforcing provision of act.--The commission shall inquire into any neglect or violation of the laws of this state or the ordinances of any city or town by any public utility doing business therein, or by the officers, agents or employees thereof, or by any person operating the plant of any public utility, and shall have the power, and it shall be its duty, to enforce the provisions of this act [8-1-2-1], as well as all other laws, relating to public utilities. Any

> forfeiture or penalty herein provided shall be recovered and suit therein shall be brought in the name of the state of Indiana in the circuit or superior court where the public utility has its principal place of business. Complaint for the collection of any such forfeiture may be made by the commission or any member thereof, and, when so made, the action so commenced shall be prosecuted by the general counsel."

The Decatur decision also established that the jurisdiction of the Public Service Commission over such claims is exclusive. It was there held that the trial court is without jurisdiction of a claim where a complaint could have been filed with the Public Service Commission. The court also noted:

> "If the legislature has provided a remedy courts have no jurisdiction over the subject-matter until such time as those remedies are exhausted or denied." 275 N.E.2d at 860.
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> * * *
>
> "Before a court may take subject-matter jurisdiction over a class of cases for which a statutory remedy exists, it must be shown that the statutory provisions are inadequate in protecting and preserving substantive rights." 275 N.E.2d at 861.

Further comments of the court bear significance here:

> "The Commission is entrusted with the authority to control and regulate public utilities. State ex rel. Indianapolis Traction & Termin-Co. v. Lewis. (1918) 187 Ind.564,

> 120 N.E. 129. As an administrative agency, it is presumed to be qualified by knowledge and experience to perform this function. The regulation of public utilities is technical field requiring expertise in must the kind of determination before us. Such questions as to what constitutes a service area, the definition of a secondary line, and the physical ability of a public utility to serve a particular area, are examples of technical questions which the legislature intended the Commission as a qualified administrative agency to answer."
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> * * *
>
> "Litigants in these circumstances cannot talke flight from an adequate statutory administrative remedy by seeking sanctuary in the courts." 275 N.E.2d at 862.

A similar expression was made in Public Service Commission of Indiana v. City of Indianapolis, supra, 131 N.E.2d at 313:

> "It is established law in this state that there is an inherent right to appeal to the courts for relief against the violations of personal or property rights as a result of administrative action. The legislature may not absolutely deprive one of such relief or judicial review. However, where the statute provides for a procedure for such review or for a judicial remedy, it excludes any common law or equitable

> procedure to the extent such statutory provisions are adequate in protecting and preserving such substantive rights guaranteed by the constitution, rights guaranteed by the consitutition, the statutes or general principles of law. Such statutory procedure must be followed at least to the extent of the remedy available before resort is made to any common law or equitable remedy. Ballman v. Duffecy, 1952, supra 230 Ind. 220, 102 N. E. 2d 646; Joseph E. Seagram & Sons v Board of Commissioners, 1943, 220 Ind. 604, 45 N.E.2d 491; State ex rel. White v. Hilgemann, 1941, 218 Ind 572, 34 N.E. 2d 129; Warren v. Indiana Telephone Co., 1940, 217 Ind. 93, 26 N.E.2d 399."

Friedland counters by citing State ex rel. Indianapolis Water Co. v Niblack (1939) 240 Ind. 32, 161 N.E.2d 377, for the proposition that the Public Service Commission is divested of an otherwise cognizable claim whenever damages are sought. Niblack, however, doe not support this proposition. The language in that case upon which Friedland relies reads:

> "We should note, however, that the commission has no judicial power to render a money judgment, as is sought by plaintiff in respondent court." 161 N.E.2d at 378.

The quoted language is obiter dicta. The court did not determine the question of the trial court's jurisdiction but rather rejected the petition for a writ of prohibition for failure of the pleadings to show entitlement to the relief sought. Furthermore, the language does no more than state the legal truism that an administrative body cannot grant relief unless it is so empowered by statute. It does not mandate the conclusion that this restriction divests the Commission of jurisdiction of an otherwise cognizable claim. On the contrary, it establishes the necessity of instituting an action in the trial court to obtain damages pursuant and subsequent to the Commission's determination of the issue.

The proper procedure for review of rates of a public utility is set forth in State ex rel. Evansville City Coach Lines v. Rawlings (1951) 229 Ind. 552, 559, 99 N.E. 2d 597, 600, and is equally applicable to attacks against practices and services of a public utility:

> "If, as is contended by respondent, relator is charging, illegal rates in the city of Evansville and thus violating an order or regulation of the public Service Commission plaintiffs, in the actions pending in said Superior Court, must first exhaust their remedy of petition to the commission by pointing out that said company is not complying with the provisions of an approved tariff schedule and is thereby violating an order of the commission. Indianapolis

Water Co. v. Moynahan Prop. Co. (1936), 209 Ind. 453, 456, 198 N.E.2d 312; Southern Ind. R. Co. v. Railroad Com., etc. (1909), 172 Ind. 113, 117, 119, 87 N.E. 966, supra; In Re Englehard & Sons Co. (1914) 231 U.S. 646, 651, 4 S.Ct. 258, 58 L. Ed, 416, 418.

"It then becomes the duty of the Public Service Commission to make an investigation of the matters alleged in said petition and if, after notice and hearing, it should find that illegal rates are being charged by relator then the commission, under the authority vested in it by the legislature, will order the offender to desist from charging such illegal rates and if, after such order by the commission, such offender refuses to comply therewith, then the commission is the proper party to institute court proceedings to compel compliance with its order. Wabash R. Co. v Railroad Com. etc. (1911), 176 Ind. 428, 439, 95 N.E. 673. On the other hand, if after such investigation the commission finds that the alleged violation does not exist, and no order is being violated, then the petitioners may have their day in court by an appeal to any court of competent jurisdiction upon the ground that the order or decision of the commission is 'insufficient, unreasonable or unlawful' as provided

in §47-1249, Burns' 1940 Replacement. Cf. State ex rel McCormick v. Superior Court of Knox County (1951), 229 Ind. 118, 95 N.E,2d 829, 832; In re Northwestern Indiana Tel.Co. (1930), 201 Ind. 667, 171 N. E. 65."

Other jurisdictions have refused to allow a claim for damages to circumvent a Public Service Commission determination. A strikingly similar set of circumstances was dealt with in Stillman and Dolan, Inc. v Chesapeake and Potomac Telephone Co. of Maryland (1976) 30 Md.App.179, 351 A.2d 172. There a customer brought an original class action in the trial court seeking damages from a telephone company for discriminatory charges and wrongful application of an approved tariff. The appellate court, interpreting statutes similar to ours, held that the Public Service Commission had exclusive jurisdiction over the determination of the propriety of such "services" of a public utility. It stated:

"It is the clear legislative intent apparent from the Public Service Commission Law, that this determination, in the first instance, be by the Commission and not by the courts. Such a determination is within the expertise of the Commission, and it is the function of that agency to hear and consider evidence brought before it, and its duty to make findings on the propriety of the Telephone Company's actions, assuming, with respect to the demurrer, they are as alleged in the declaration. We can conceive that there may be valid reasons why demands for

every type of service cannot always be met forthwith. Whether particular facts constitute a failure to extend a privilege or facility uniformly enjoyed by others under substantially similar circumstances, or whether the failure or refusal to grant certain services results in any 'undue or unreasonable prejudice' or is discriminatory, or causes 'any undue or unreasonable prejudice', cries for expert evaluation, and this evaluation is the function of the Commission" 351 A.2d at 178.

The Court in Stillman further held that where a remedy was available from the Public Service Commission which contemplated a determination of the precise issue upon which further relief in the trial court would depend, such administrative remedy would require exhaustion even though the specific relief available from the Commission would differ from that available in the trial court. The court quaoted Spintman v. Chesapeake and Potomac Telephone Co. of Maryland (1969) 254 Md. 423, 424, 255 A.2d 304, 307 as follows:

"'The soundness of having such matters originally determined by a commission of persons qualified to evaluate the issues in a specialized field lies beyond dispute.

* * *

If we were to follow the argument advanced by [Spintman]to its logical conclusion, we would witness the chaotic situation where juries would be performing the rate making function of the Public Service Commission by having a veto power over rates. Certainly, such would

be the ultimate and practical effect on their action if they were allowed to render a verdict for reparation in favor of the plaintiff consumer in an action of assumpsit." [citation omitted] The observation is apt with respect to any question which it is the duty of the Commission to determine originally." (emphasis supplied) 351 A.2d at 179.

In Philadelphia Electric Company v. Pennsylvania Human Relations Commission (1972) 5 Pa. Cmwlth. 329, 290 A.2d 699, the court held that complaints concerning discrimination in rendering services by a public utility were within the exclusive jurisdiction of the Public Utility Commission. The court commented upon the Pennsylvania Public Utility Law, as follows:

"The provisions of the Public Utility Law imposing regulatory duties on the PUC are so comprehensive and detailed that the courts have consistly held that that Commission was intended to be the sole agency for the regulation of these immense, complex, essential and necessarily monopolistic business enterprises. As a corollary, the courts have steadfastly repulsed efforts of all other interests including, untypically, the judiciary itself, to intrude upon the areas committed to the PUC.. . .[M]atters within its jurisdiction must be determined by it even to the exclusion of the courts in the first instance." (Emphasis supplied) 290 A.2d at 701-702.

* * *

"The Public Utility Code clearly prohibits discrimination in rates and services for whatever reason and just as clearly empowers the

> PUC to hear and decide such complaints." 290 A.2d at 703.

We conclude that any award of damages pursuant to I.C. 8-1-2-107 concerning conduct as specifically defined under I.C. 8-1-2-103 and I.C. 8-1-2-105 must be preceded by a determination of the Public Service Commission that such conduct or acts are "unlawful". Judicial review of the reasonableness of the Commission's determination may be obtained through the normal appellate channels provided by I.C. 8-1-3-1 (Burns Code Ed. 1973), et. seq.

The trial court is without jurisdiction to entertain the claim as presented. We reverse the class certification appealed, and order that it be vacated.

STATON, J. (participating by designation) and
WHITE, J. CONCUR.

STATE OF INDIANA

COURT OF APPEALS

No. 2-676A242

Indiana Bell Telephone Company, Inc.

v. M. Daniel Friedland

denied Appellee's Petition for Rehearing, Lowdermilk, A.C.J.

Dated 17th day of April 1978.

STATE OF INDIANA

SUPREME COURT

No. 2-676A242

Indiana Bell Telephone Company, Inc.,
v. M. Daniel Friedland

"Petition for Leave to File Brief of Amicus Curiae" is hereby denied. C. J. Givan, All Justices Concur.

Appelle's (M. Daniel Friedland's) Petition for Transfer is hereby Denied.

Dated 14th day of July 1978.